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MARRIAGE REGISTRARS, SAME-SEX MARRIAGE, AND THE UNDERSTANDING OF RELIGIOUS DISCRIMINATION IN THE EUROPEAN COURT OF HUMAN RIGHTS

Christopher McCrudden*

I. INTRODUCTION

There is a multiplicity of differing ways in which religious beliefs and practices are ‘protected’ from state interference, but in essence this diversity of approach resolves into three main approaches: (i) a freedom of religion approach in which the practice of religion is protected; (ii) a protection from religious coercion and undue religious entanglement with the state; and (iii) an anti-discrimination approach in which religious discrimination is prohibited. Using the terminology of the United States Constitution, let’s call these the free exercise, establishment, and equal protection approaches. Similar approaches, using different terminology, can be found in most modern systems committed to human rights.

The assumption is often made that issues of religious conscience arise primarily in the context of the first of these approaches: an individual with a conscientious belief argues that the guarantee that we are free to practice our religion means that anti-discrimination law prohibiting gender, or race, or sexual orientation discrimination that requires us to contravene our conscience should be limited, or overridden, or set aside: the conscientious believer should be granted an exemption from the application of anti-discrimination law. This framing of the issue means that the conflict is a relatively straightforward one between freedom of religion and freedom from discrimination. And there have, indeed, been several high profile cases that have been formulated in just this way, and the conflicts between equality and freedom of religion that are generated are complex and multifaceted. In some jurisdictions, this may, indeed, be the principal way in which the issues will be framed.

* FBA; Professor of Human Rights and Equality Law, Queen’s University Belfast; William W Cook Global Professor of Law, Michigan Law School. An earlier version was presented at the symposium: *(How) Should the European Court of Human Rights Resolve Conflicts Between Human Rights?*, Human Rights Centre, Ghent University, 16 October 2014, and at the conference: *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality*, will Cardozo Law School, 20-21 September 2015. I am particularly grateful to Judge Paul Lemmens of the European Court of Human Rights for commenting on an earlier version of the paper at the symposium, and to Robert Post for commenting on a more recent version of the paper at the conference. Full disclosure: I was Junior Counsel representing Ms Ladele in the European Court of Human Rights, and subsequently provided legal advice to the Catholic Bishop’s Conference of England and Wales on the legal implications of the same-sex marriage legislation during the Parliamentary consideration of the Bill.

But, at least in the European context, to conceive the problem of religious conscience *only* in this way is misleading, and evades an even more difficult issue. Recently, much more attention has been given to the relationship between conscience and discrimination in a way that generates tensions *within* the concepts of equality and discrimination themselves. This is because, increasingly, the claim to protection by the conscientious believer is formulated in anti-discrimination terms rather than (or sometimes in addition to) freedom of religion terms: the claim is that by requiring me to conform to an anti-discrimination requirement that prohibits racial or gender or sexual orientation, you discriminate against me on religious grounds. In this paper, I shall be focusing, therefore, on conflicts within equality that are generated by claims to the protection of religious conscience formulated as religious discrimination claims.

The example I want to take to illustrate this approach, and its problems in the European Convention on Human Rights (ECHR) context, is the case of *Ladele v United Kingdom*, decided in January 2015 by the European Court of Human Rights (ECtHR).¹ Lillian Ladele was a marriage registrar, with years of good service, employed by a local public authority (the London Borough of Islington). The law in the United Kingdom changed whilst she was in post to permit civil partnerships between same-sex couples. Ms Ladele had a sincere conscientious objection to performing civil partnership ceremonies, arising from her Christian faith. In spite of her protests, Ms Ladele was designated to register and perform civil partnership ceremonies by the local authority, contrary to her religion and conscience. She refused, was disciplined, and forced to resign. She claimed religious discrimination in the national courts, won at first instance, lost at the domestic appellate level, and then took her case to the ECtHR, where she also lost.

In this chapter, I hope to achieve four aims. First, in Part II, I set out and analyse the facts and reasoning of the ECtHR in *Ladele*, and suggest that in several respects the Court's approach is problematic. Second, in Part III, I suggest that the problem that the *Ladele* case presents, and the approach that the Court takes in addressing this problem, raises broader questions, going beyond the acceptability of arguments based on conscience. My argument will be that in carrying out their adjudicatory task in religious discrimination litigation, such as *Ladele*, there is a fundamental problem that the courts are faced with on a recurring basis. As a shorthand way of describing it, I'll call it the 'teleological' problem. By the teleological problem, I mean the problem that the courts face of deciding what human rights protections relating specifically to discrimination are *for*, what their aim or *telos* is. I suggest that this difficulty arises both for those provisions dealing with religious discrimination, as well as for those provisions dealing with discrimination on other grounds. There is essentially no clear answer to the question as to what they aim to achieve,

¹ *Ladele v United Kingdom* was one of four cases heard together by the ECtHR, *sub nom Eweida and others v United Kingdom* (2015) 57 EHRR 8.

and when they come into conflict, the courts are thrown into confusion. The result (in *Ladele*) is that the Court considers the teleology of religious anti-discrimination to be largely co-terminous with freedom of religion. The Court, in other words, defaults to an understanding of religious *discrimination* claims as masked *freedom of religion* claims. The effect is significantly to blunt the radical potential of religious discrimination claims and incorporate elements into the legal analysis of such claims that are *sui generis* in the anti-discrimination context.

Third, in Part IV, I offer some preliminary and provisional thoughts as to how to address this problem at the judicial level in the context of anti-discrimination law. In particular, I argue that the human rights system should be aiming to encourage a genuine dialogue between conscientious believers and the wider public, and that there are three particularly important doctrinal moves that courts' could usefully make to encourage and sustain such a dialogue: adopting the concept of pluralism as the central *telos* of religious anti-discrimination law; adopting the idea of secularity rather than secularism as the appropriate way of conceiving the public space; and adopting a radical understanding of religious accommodation. In this way, I suggest, our commitment to religious pluralism engendered through dialogue can better be achieved.

Finally, in Part V, I briefly test what difference adopting the recommended approach would have made in the *Ladele* situation.

II. AN ANALYSIS OF THE *LADELE* CASE

Introduction

The local authority that employed Ms Ladele was under no legal obligation to designate her as a civil partnership registrar. Nor was there any practical need for her to be designated in order for the local authority to provide the service of registering civil partnerships to gay couples. Prior to designating her, the local authority was aware of Ms Ladele's religious conscientious objection but did not consult her on its decision to designate her. Having been designated, when she objected to being compelled to form civil partnerships and repeated her religiously-based conscientious objection, she was disciplined for gross misconduct, and ultimately resigned as a result of the treatment she received. The local authority gave no weight to her religious beliefs. Having lost at the

domestic level, Ms Ladele brought a claim for religious discrimination in the ECtHR, alleging a breach of Article 14,² taken together with Article 9.³

Lillian Ladele's case raises significant questions about the correct interpretation of the ECHR in cases involving religious belief and practice in the workplace and in public life. Should such a religious conscientious objection be accommodated in circumstances where accommodating it would have no adverse effects on the conduct of the employer's business or on the rights of any individual? Does discrimination on grounds of religious belief requiring particularly weighty reasons for it to be justified under Article 14, read with Article 9 of the Convention (similar to the idea of a suspect classification under the US Fourteenth Amendment),? Should the right to equal treatment on grounds of religious belief be afforded less weight than the right to equal treatment on grounds of sexual orientation? What margin of appreciation should be afforded to states in cases of religious discrimination?

Chamber decision in Ladele

The Fourth Section of the European Court of Human Rights (ECtHR) gave the *Ladele* case priority status and joined it with three other cases (*Eweida, Macfarlane and Chaplin*), all from the United Kingdom. *Eweida* and *Chaplin* alleged a breach of Article 9 (freedom of religion) on the basis that the applicants had not been allowed to wear religious symbols. Macfarlane alleged a breach of Article 9 on the basis that he had been dismissed for failure to commit to offering sexual counseling services to same-sex couples. The cases were joined as 'test cases' to allow the Fourth Section to identify and apply the relevant principles across an area of jurisprudence; each applicant was separately represented. On the 15th January 2013, the Fourth Section of the Court held by five votes to two that there had been no violation of Article 14 taken in conjunction with Article 9 in respect of Ms Ladele.⁴ Mr Macfarlane and Ms Chaplin also lost. Ms Eweida's case was alone in being upheld, although its practical significance was limited, since British Airways had already conceded the point.

² Article 14 ECHR provides: 'The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

³ Article 9 ECHR provides: '1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

⁴ *Eweida and Others v. United Kingdom (in the application of Ms. Ladele)* (2015) 57 EHRR 8.

Alone among the four cases, Ms Ladele's case was based on Article 14 read with Article 9, not Article 9 by itself. In other words, her case was formulated as an anti-discrimination argument, rather than a freedom of religion argument. Three major issues were presented to the Court in *Ladele*. Of these three, the Court agreed with Ms Ladele's argument in two and disagreed in the third. I shall briefly mention the two issues in which Ms Ladele succeeded, before turning to the third, in which she was unsuccessful.

To reach the conclusion that Ms Ladele's claim should be upheld, the Court nevertheless had to decide that Ms Ladele's claim fell "within the ambit" of Article 9. Unless it was within the ambit of Article 9, Article 14 would not be engaged because Article 14 is not a "stand-alone" anti-discrimination provision, but one that is parasitic on other substantive protections in the ECHR. The Government argued that for a claim to be within the ambit of Article 9, there had to be a breach of Article 9. The Court, however, held that "the application of Article 14 does not presuppose a breach of one or more of [the other substantive provisions]."⁵ And then, later: "it is clear that the applicant's objection to participating in the creation of same-sex civil partnerships was directly motivated by her religious beliefs. The events in question fell within the ambit of Article 9."⁶ This finding has important implications for future litigation under Article 14 religious discrimination claims. The applicant does not have to show that she was engaged in a "manifestation of religion" in the narrow sense of being involved in some religious ritual, in order for her claim to be "within the ambit" of Article 9. Nor does the applicant have to show an "interference" with the manifestation of religion, in order for Article 14 to be engaged. Future applicants will only need to show that their actions were, in the Court's words, "directly motivated by religious beliefs."

The second major issue on which Ms Ladele persuaded the Court was that she had been treated in such a way as to establish a *prima facie* claim of religious discrimination, which the Government needed to justify. For a claim of discrimination under Article 14 to succeed, an applicant must show that he or she was either (a) *treated differently* from other persons in analogous, or relevantly similar situations, or (b) *treated similarly* to persons in relevantly different situations. Ms Ladele's claim arose under (b), i.e. she argued that she was treated similarly to other persons in relevantly different situations. In failing to treat Ms Ladele differently from those staff who did not have a conscientious objection to registering civil partnerships, she argued that the local authority failed "to treat differently persons whose situations are significantly different", as the Court put it in *Thlimmenos v Greece*,⁷ which has often been seen as having introduced the idea of "indirect" discrimination (or the "effects" test, to use American terminology) into ECHR

⁵ at para 85.

⁶ *Eweida*, para 103.

⁷ *Thlimmenos v Greece* (2001) 31 EHRR 15.

jurisprudence. The Court agreed that she had correctly identified the relevant comparators, holding that the “relevant comparator in this case is a registrar with no religious objection to same sex unions.” The Court further agreed that failing to treat her differently from those staff meant that the local authority failed “to treat differently persons whose situations are significantly different”. The Court agreed with the applicant’s contention “that the local authority’s requirement that all registrars ... be designated as civil partnership registrars had a particularly detrimental impact on her because of her religious beliefs.”⁸

The Court therefore held that Article 14 was engaged, and that the public authority’s treatment of Ms Ladele amounted to a *prima facie* breach of Article 14’s prohibition on indirect discrimination. The third and remaining issue (which led to her case being dismissed by the ECtHR) was the critical issue of justification: whether the treatment afforded to Ms Ladele pursued a legitimate aim and was proportionate to the achievement of the aim pursued.⁹ On this issue, there is extensive jurisprudence in the Article 14 context, but the operative part of the Court’s decision in *Ladele* does not refer to this in any detail. The Court’s complete findings on the issue of justification were as follows:

It remains to be determined whether the means used to pursue this aim were proportionate. The Court takes into account that the consequences for the applicant were serious: given the strength of her religious conviction, she considered that she had no choice but to face disciplinary action rather than be designated a civil partnership registrar and, ultimately, she lost her job. Furthermore, it cannot be said that, when she entered into her contract of employment, the applicant specifically waived her right to manifest her religious belief by objecting to participating in the creation of civil partnerships, since this requirement was introduced by her employer at a later date. On the other hand, however, the local authority’s policy aimed to secure the rights of others which are also protected under the Convention. The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights (see, for example, *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I). In all the circumstances, the Court does not consider that the national authorities, that is the local authority employer which brought the disciplinary proceedings and also the domestic courts which rejected the applicant’s discrimination claim, exceeded the margin of appreciation available to them. It cannot, therefore, be said that there has been a violation of Article 14 taken in conjunction with Article 9 in respect of [Ms Ladele].¹⁰

It was this approach to the issue of justification that raised the serious questions affecting the interpretation of the Convention that Ms Ladele sought to have referred to the

⁸ *Eweida*, para 104.

⁹ *Eweida*, para. 104.

¹⁰ *Eweida*, para 106.

Grand Chamber, which ultimately declined to accept the case, thus leaving the Chamber decision to stand.

Approach adopted to “justification”

We need at this point to parse this critical paragraph on “justification” carefully. Two aspects of the approach taken are of considerable importance. The first is that the Court makes clear that the “national authorities” whose action is being scrutinized consists not only of the local authority, but also comprises the various courts that adjudicated the issue, including in particular the English Court of Appeal. It is necessary, then, to include the approach taken by these national courts within the idea of what ‘the state’ did to Ms Ladele, and why, in deciding whether the United Kingdom breached the Convention. The second important point that emerges from a close reading of the paragraph, is that the ECtHR decides that there is no breach of the Convention, “[i]n all the circumstances”. The “circumstances” include the justification for the local authority’s actions advanced by the Court of Appeal, which is therefore effectively incorporated by reference into the judgment of the ECtHR.

Critically, therefore, we need to turn to the domestic Court of Appeal’s judgment in order to understand the ECtHR’s approach. The Court of Appeal had set out in an important paragraph a summary of the reasons why it held that the local authority’s actions were justified, and therefore why it would not make a finding of indirect discrimination.

Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele’s refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington’s Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington’s employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele’s refusal was causing offence to at least two of her gay colleagues; Ms Ladele’s objection was based on her view of marriage, which was not a core part of her religion; and Islington’s requirement in no way prevented her from worshipping as she wished.¹¹

There are two main issues regarding the Chamber’s approach to justification, read together with this passage from the Court of Appeal, that I want to focus on: first, what is the standard that the state must meet in order to rebut the *prima facie* discrimination case - - the issue of whether a *prima facie* case of religious discrimination can only be rebutted if the state establishes “very weighty reasons” justifying that discrimination, which is the standard applied in race, sex, and sexual orientation discrimination; and, second, how and

¹¹ *Ladele v London Borough of Islington* [2010] WLR 955, [2010] ICR 532, [2009] EWCA Civ 1357, [52].

why the Court applied the ‘margin of appreciation’ doctrine in this case, and what the implications of its approach on this issue are more broadly.

Religious discrimination and “very weighty reasons”

As is well known, claims based on race, sex, sexual orientation, and several other grounds, are considered by the Court to merit a particularly high degree of protection. In such cases, the function of Article 14 is not to be merely ancillary to the other substantive rights. It has an important autonomous role in protecting individuals from unfair discrimination.

“Very weighty reasons” have to be shown by the State before the Court will regard *prima facie* cases of such discrimination as compatible with Article 14. These have sometimes been called “*suspect categories*” by commentators, drawing on United States Supreme Court Fourteenth Amendment jurisprudence. In *Ladele*, the Court reiterated its previous case law regarding sexual orientation, that “differences based on sexual orientation require particularly serious reasons by way of justification.” Where a Contracting Party is required to demonstrate “very weighty reasons”, or “particularly serious reasons”, it is less likely that the Court will apply an extensive margin of appreciation in such cases. Both the issue of margin of appreciation and the weight of the burden of justification under Article 14 are intimately related.

Ms Ladele had argued that in claims of discrimination under Article 14, read with Article 9, “religion” is a ground of discrimination that requires “very weighty reasons” at the justification stage. She argued that the Court had previously adopted a similar test in *Hoffmann v Austria*,¹² and ought to apply this test in her case. Indeed, in *Redfearn v UK*,¹³ decided on the 6th December 2012, a month before *Ladele* was decided, Judge Bratza, who was in the majority in *Ladele*, specifically listed “religion” as a suspect category meriting the “very weighty reasons” test, citing the *Hoffmann* case.¹⁴ Yet there is no reference to *Hoffmann* in the Court’s judgment in *Ladele*, or to very weighty reasons being required in the religious discrimination context.

As we have seen, in *Ladele*, the Chamber dealt with the whole question of legitimate aim and proportionality very briefly. Two of Ms Ladele’s arguments were addressed and accepted by the Court. The Court accepted Ms Ladele’s argument that “the consequences for the applicant were serious.” As the Court said: “she lost her job”.¹⁵ The Court also agreed with Ms Ladele that she could not be regarded as having “waived her

¹² (1994) 17 EHRR 293, para 36

¹³ Application no. 47335/06,

¹⁴ Joint Partly Dissenting Opinion of Judges Bratza, Hirvelä and Nicolaou, para 4

¹⁵ *Eweida*, para 106.

right to manifest her religious belief ... since [the employer's requirement that she officiate at same sex partnership ceremonies] was introduced by her employer at a later date."¹⁶

Beyond that, however, it is unclear what, exactly, the Court decided. *If* the Court rejected the argument that religion qualifies as a "suspect" ground, this gives rise to the paradoxical situation in which a ground that is explicitly included in the text of Article 14 ("religion") is accorded less protection than a ground that is not explicitly included in the text ("sexual orientation") but was introduced by judicial interpretation of "other status". From Ms Ladele's perspective, there appeared to be no justification for such a hierarchy of grounds of discrimination. The argument that religion was not a "suspect" ground would also be inconsistent with a more recent judgment by the Court, in *Vojnity v Hungary*.¹⁷ In this case, decided on 12 February 2013 (after the judgment of the Chamber in *Ladele* but before the Grand Chamber rejected the appeal), the Second Section stated explicitly that religion should now be considered to be a suspect category, requiring "very weighty reasons".¹⁸

A second possible interpretation of the Court's decision in the relevant paragraphs in *Ladele*, is that the Court concluded that any government efforts to eradicate discrimination on grounds of sexual orientation will *automatically* be proportionate simply by virtue of that fact. The Court may have accepted the Government's argument that requiring Ms Ladele to validate same-sex civil partnerships was intended to send a message on the importance that the local authority attached to the principle of eradicating sexual orientation discrimination (irrespective of no individual's rights having been adversely affected), and that this automatically attracted priority over any religious equality interests and the adverse effect on Ms Ladele's rights. If so, as Ms Ladele argued, this was not the appropriate approach to adopt to the role of proportionality under Article 14. If proportionality means anything, she suggested, it means that it is unacceptable to give one factor *automatic* priority. The Court did not address this issue, perhaps because the Court considered that no such automatic priority *had* been accorded. The Court refers in its judgment to "striking a balance between competing rights,"¹⁹ implying that both competing rights were accorded some weight (an issue I return to in a moment).

Margin of appreciation

These two interpretations do not exhaust the possible interpretations. It is probably the case that a third interpretation of the Court's decision better explains the Court's approach than those we have just considered, although this third interpretation is not set out explicitly in the Court's judgment. This third interpretation is that the Court decided to

¹⁶ *Eweida*, para 106.

¹⁷ Application no. 29617/07.

¹⁸ *Vojnity*, para 36)

¹⁹ *Eweida*, para 106.

afford a wide margin of appreciation to the national authorities in this case and therefore considered that it did not *need* to decide whether discrimination on grounds of religion is properly to be treated as a suspect category in this case, or to grapple with the complexities of applying proportionality in these circumstances.

Ms Ladele had argued that according the Government a wide margin of appreciation was wrong in law in this case. A margin of appreciation, she stated, must be earned by Member States and should apply only when the national authorities have in place the appropriate procedures for ensuring compliance with the Convention. The role for a margin of appreciation, she suggested, is particularly narrow if religion is a suspect ground of discrimination that attracts the test of “very weighty reasons”, as it should.

In Ms Ladele’s case, she said, neither the public authority that employed her, nor the domestic courts that heard her case, had ever conducted any proportionality analysis. Her right to equal treatment on grounds of religious belief had been afforded no weight at all in the national proceedings. In the circumstances, Ms Ladele argued, the adoption of the concept of the margin of appreciation by the Court was wrong in principle. The proper role of this doctrine is in the context of assessing the results of a properly executed proportionality analysis carried out at the national level. Where the national authorities have not assessed the proportionality of discriminatory treatment afforded to a victim, there is no good reason to afford them any margin of appreciation. The United Kingdom, by failing to ensure that the national authorities (including the domestic courts) carried out an appropriate proportionality analysis, had failed to earn the margin of appreciation.

The Chamber of the Court in *Ladele* did not address this argument, and accepted that the local authority’s aim, as set out by the Court of Appeal, was “to provide a service which was not merely effective in terms of practicality and efficiency, but also one which complied with the overarching policy of being “an employer and a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others”.²⁰ The Court did not, however, address or respond to Ms Ladele’s arguments that there was no sufficient connection of proportionality between this aim and the decision to designate Ms Ladele as a civil partnerships registrar.

On the facts found by the first instance adjudicatory body, the Employment Tribunal, a decision not to designate Ms Ladele as a civil partnerships registrar would have had no adverse effect on equality of opportunity for same sex couples. There was no obligation on the local authority to designate her, and there would have been no adverse effect on the service provided to same sex couples had they decided not to do so. Had Ms Ladele remained as a marriage registrar, and had not been designated as a civil partnerships

²⁰ *Ladele*, Court of Appeal, para 105.

registrar, it would have been legally impermissible under the domestic legislation for her to register or perform civil partnerships. There would, therefore, have been no question of her discriminating against others, and no inconsistency with the local authority's equal opportunities policy. The local authority's equal opportunities policy applied to religion as well as sexual orientation. A policy of forcing Ms Ladele to be designated as a civil partnerships registrar was in fact *inconsistent* with the local authority's equal opportunities policy, since it involved discrimination against Ms Ladele. The same policy ultimately caused two other registrars in the same authority, one Muslim, one Christian, to leave their profession for reasons of conscience. Neither the local authority nor the national courts adequately considered the significance of this fact.

In addition, other local authorities in the UK had chosen not to designate as civil partnership registrars those marriage registrars already in their employment who had a conscientious objection to performing the civil partnership role, at least where they could do so without any adverse effect on the service offered to same sex couples. There was no explanation as to why Islington could not and should not have done the same in this case. The decision to designate Ms Ladele with prior knowledge of her religious conscientious objection pursued no legitimate aim, therefore, and created an unnecessary situation whereby Ms Ladele was prevented from continuing in public service by reason of Islington's refusal to accommodate her sincerely held religious beliefs.

There is a further problem. Granting a wide margin of appreciation in cases such as this, where there has been no proper proportionality analysis by the national authorities or courts, gives little or no guidance to domestic courts, legislatures, or other public authorities in future cases, except to say that a very large proportion of cases are now subject to the margin of appreciation. This is an undesirable result and undermines the effective protection of human rights. Nor is this what the Court does in practice in other circumstances. For example, in *Associated Society of Locomotive Engineers & Firemen v United Kingdom*,²¹ the Court itself conducted a balancing exercise between two rights both protected by the Convention, and explicitly denied a wide margin of appreciation to the United Kingdom authorities. So too, for example, where the rights of homosexuals to adopt children were restricted by public authorities in order to further what they considered the best interests of children, the Court has been prepared to intervene to protect the rights of the homosexual applicants and has not left the issue to the margin of appreciation.²² So why did the Court apply the margin of appreciation in the *Ladele* case? No clear answer was provided.

Aftermath

²¹ Application no. 11002/05, judgment of 27 February 2007, (2007) 45 EHRR 34, at para 46.

²² *E.B. v France*, application no. 43546/02, judgment of 22nd January 2008, (2008) 47 EHRR 21.

The issue of whether or not to accommodate the conscientious objections of registrars came before the United Kingdom Parliament in the same sex marriage Bill during 2013 in a much more sustained and serious way than had occurred in the context of the earlier legislation introducing civil partnerships, at issue in *Ladele*.²³ In the same sex marriage Bill, the issue was centre-stage in the Parliamentary debates, not least because of the publicity surrounding *Ladele*.

Despite sustained attempts to provide for protections in domestic law for civil registrars, there is nothing in the Act that was passed that permits a registrar to refuse to conduct *civil* same sex marriages on the ground that she or he has a conscientious objection to doing so. Indeed, in one way, the Act is more restrictive than the position was under civil partnerships: as we have seen, local authorities that were willing to allow registrars not to conduct civil partnerships were permitted under the legislation to do so (even though Islington chose not to) -- the Civil Partnership Act 2004 had given local authorities the discretion to decide whether or not to designate their registrars as civil partnership registrars. However, the 2013 same sex marriage legislation accorded local authorities *no* discretion; it has effectively forced every local authority to designate their registrars as same sex marriage registrars, and then required them to conduct these marriages.

The absence of protection for registrars in the civil context contrasts markedly with the protection from compulsion to conduct such marriages that is afforded to clergy (or others within religious organizations). Civil registrars will not be afforded the protection from compulsion that *clergy* have in relation to same sex marriages *in the religious context*. The Act includes a conscientious objection protection for Ministers or other religious figures from being required by their Church to take part in same-sex religious marriages, if the Minister or other religious figure objects. So a Liberal Jewish rabbi who objected to same sex marriages would not be ‘*compelled*’ to undertake such marriages even though Liberal Judaism in general has opted to conduct religious same sex marriages.

One of the raft of amendments that Parliament examined was a much broader conscientious objection provision which would have applied to all those acting as registrars as a group in both civil and religious marriage contexts.²⁴ This was intended to permit all

²³ The issue had not even been raised in the Civil Partnership Bill, although it was considered briefly during the passage of the later Equality Act 2010.

²⁴ The proposed amendment provided:

“Conscientious objection

(1) Subject to subsections (2) and (3) of this section, no registrar shall be under any duty, whether by contract or by any statutory or other legal requirement, to conduct, be present at, carry out, participate in, or consent to the taking place of, a relevant marriage ceremony to which he has a conscientious objection.

registrars to exercise their right to freedom of thought, conscience and religion. A conscientious objection clause, such as this, was not unprecedented in the British context. Section 4 of the (British) Abortion Act 1967, for example, allows individuals with conscientious objections to abstain from participating in abortions. The proposed amendment partly drew on that conscientious objection provision in the Abortion Act, in requiring that the registrar's objection must be based on a sincerely held religious or other belief, and in placing the burden of proof on the registrar claiming to rely on it.

But, in an attempted compromise, the proposed amendment was significantly more limited than that in operation in the abortion context. The amendment would not have allowed individuals to exercise a conscientious objection if doing so would result in same sex couples being unable to access this service. So, if sufficient numbers of registrars were not available in any area, a registrar with a conscientious objection would have a duty to conduct the same sex marriage. Therefore, no same sex couple would be prevented from marrying by reason of this amendment. However, both the Government and the Opposition opposed this amendment and it was defeated in both Houses of Parliament.

III. THE PROBLEM OF TELEOLOGY IN RELIGIOUS LITIGATION

In this Part, I suggest that the Court in *Ladele* has fundamentally misunderstood what it means to consider a religious anti-discrimination claim, as opposed to one based in freedom of religion, and that in several critical respects the Court has adopted perspectives that appear to derive from the Court viewing the case through the freedom of religion lens rather than the anti-discrimination lens. In order to make this case, I begin, first, with a brief discussion of the teleology of religious freedom provisions before turning to contrast these with the teleology of religious anti-discrimination provisions. I then consider how the Court's approach in *Ladele* appears much closer in several respects to the former than to the latter.

Teleology of religious freedom protections

The ECHR contains several different kinds of rights, or at least rights with different weights. So, we can distinguish those rights, such as the right to be free from torture,²⁵ the

(2) *Nothing in subsection (1) shall affect the duty of each registration authority to ensure that there is a sufficient number of relevant marriage registrars for its area to carry out in that area the functions of relevant marriage registrars.*

(3) *The conscientious objection must be based on a sincerely held religious or other belief.*

(4) *In any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it."*

²⁵ Article 3 ECHR.

right not to be held in slavery,²⁶ and the right to life,²⁷ as rights that have very considerable weight. In the case of torture and slavery, we even say that the right is “absolute” in the sense that the right has such weight that no other consideration is sufficiently important for it to trump that right. Other rights, in particular such rights as the right to a private life,²⁸ the right to freedom of speech,²⁹ and the right to freedom of assembly,³⁰ are structured so that other considerations can be taken into account in determining whether that right has been breached. In that sense, these rights are qualified rather than absolute. “Qualified” rights are thus highly contextualized, requiring judgements to be made about how the right is to be exercised in particular situations, and the limits on that right.

The right to freedom of religion in the ECHR is partly of the first type, and partly of the second type.³¹ The right to ‘freedom of thought, conscience and religion’ has two dimensions. First, there is the “freedom to change his religion or belief”; this is not subject to any limitation (we might say it is an “absolute” right). Second, there is the “freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance”; this is a “qualified” right, subject to limitations set out in the second part of Article 9 itself. The way in which this limitation provision is drafted (any limitations on the right must be “necessary in a democratic society”) leads the ECtHR to test for “proportionality”: that is, the Court considers if the purpose of the limitation of the right is legitimate, if the limitation is necessary for attaining that purpose, and if the measure strikes a proper balance between that purpose and the right that is being restricted.

The inclusion of a right to freedom of religion in both aspects requires explanation and justification, but it is the second form on which particular attention has been lavished, because it is the ‘manifestation’ of religious practice in public that is more likely to meet with opposition, at least in modern circumstances. There is now a sophisticated literature in both law and philosophy discussing why it is, or is not, appropriate to include special protections for freedom of religion as such. What is it about religion that should lead to it being given a specially tailored right? What is the value that a freedom of religion provision protects that can’t be equally well catered for by other provisions, such as freedom of speech, privacy, rights to marry, property rights, the right to education, and so forth? Think of it this way: assume, for the moment, that a Bill of Rights guaranteed freedom of association, freedom of speech, and freedom from discrimination (including on grounds of religion), would anything be lost if there were not a provision guaranteeing freedom of

²⁶ Article 4 ECHR.

²⁷ Article 2 ECHR.

²⁸ Article 8 ECHR.

²⁹ Article 10 ECHR.

³⁰ Article 11 ECHR.

³¹ Article 9 ECHR.

religion in the form that we have in the ECHR? For some, of course, there is no good justification for such special protection: religion should stand or fall according to the same standards as other systems of belief and action.

For those who consider that there is a place for a freedom of *religion* provision, however, one of several different responses tends to be adopted. Freedom of religion is sometimes regarded as special because in the past religious disputes have proven so fractious and divisive that, for the sake of peace, it is inadvisable for the state to intervene in religious controversies unless there is a very strong reason to do so. This concern dates at least from the need to resolve the religious wars that scarred much of the Seventeenth and Eighteenth Centuries in Europe. Guaranteeing freedom of religion was seen as a means of guaranteeing civil peace. For British courts, guaranteeing freedom of religion for this reason remains of current significance. Lord Nicholls, for example, stressed how respecting another's religious beliefs, "enables [us] to live in harmony. This is one of the hallmarks of a civilized society. Unhappily, all too often this hallmark has been noticeable by its absence. Mutual tolerance has had a chequered history even in recent times. The history of most countries, if not all, has been marred by the evil consequences of religious and other intolerance."³²

The potential for civil strife if religious passions are not moderated by mutual tolerance therefore provides an important background consideration against which to interpret the role of freedom of religion. Where courts have a feeling that accepting claims to freedom of religion is likely to increase rather than decrease religious tensions, they tend to react negatively. It is noteworthy, for example, that in upholding the compromise that a school had worked out over which types of Islamic dress to permit, Lord Bingham stressed the "period of harmony ... to which the uniform policy was thought to contribute", how the compromise was "acceptable to mainstream Muslim opinion", how the changes proposed by the claimant "would or might have significant adverse repercussions", and how the Court would be "irresponsible" to override the school "on a matter as sensitive as this."³³ The "confrontational"³⁴ and the "threatening"³⁵ nature of the way in which the issue was raised by the claimants, and the sense that an "extremist version of the Muslim religion"³⁶ might be being promoted, will not have helped the applicant either. In the same case, Lady Hale was even more explicit: "The school's task is ... to promote the ability of people of diverse races, religions and cultures to live together *in harmony*."³⁷

³² In *R (Williamson) v. Secretary of State for Education and Employment* [2005] 2 AC 246, at [15], per Lord Nicholls.

³³ *R (SB) v. Governors of Denbigh High School* [2007] 1 AC at 34 (Lord Bingham).

³⁴ At [80], per Lord Scott.

³⁵ At [79], per Lord Scott.

³⁶ At [65], per Lord Hoffmann.

³⁷ At [96].

There is a second, alternative argument adopted by those who consider that there is a place for a freedom of *religion* provision: that there is there is some particular added value that religious freedom protects that the other rights do not, such as the importance of individual conscience, or the value of being reminded of the importance of the spiritual. The parallels between privacy and freedom of religion in this regard are in some ways quite striking. Freedom of religion emphasizes membership in a religion as something that involves *private* beliefs and activity. Indeed, there is much in common more generally between the idea of a zone of privacy and the protection of freedom of religion. The protection of the first aspect of freedom of religion distinguished earlier, the *forum internum* as it is called, has much in common with a privacy idea. Under freedom of religion more generally, the approach taken is one that emphasizes the singular importance of the individual's choice to act on a particular belief. It is similar to deciding whether or not to engage in sexual activity, and of what type, both choices which are regarded as *private* choices. The idea of toleration is also central to both. As with privacy in the sexual orientation context, under freedom of religion judges are not called on to approve the religion or belief that claims protection, simply to be prepared to tolerate it. Freedom of religion, in this justification, protects the free choices of autonomous individuals within a zone of beliefs. One can say that this is the primary understanding of the freedom of religion protected by Article 9 ECHR. Indeed, the Court has said as such: ‘... religious freedom is *primarily* a matter of individual conscience ...’³⁸

These aspects of freedom of religion are often seen as involving different aspects of what American jurisprudence would call the First Amendment “free exercise” of religion. We have, however, already identified another aspect of freedom of religion, what we have termed ‘freedom *from* religion’, or at least freedom from religion imposed as an exercise of state authority. The limited version of this aspect of religious freedom adopted in the ECHR amounts to a requirement that the state should not coerce individuals to adopt a religion, and should not favour one religion over another. The ECtHR has held that national governments cannot unreasonably discriminate between religions with regard to the requirements that the church must fulfill.³⁹ So, Article 9 safeguards the right of one religion to be free to operate on conditions equal to other churches, especially where the action of the State causes an unjustified restriction on the exercise of religious freedom in its collective dimension.⁴⁰

The relationship between the individual and the collective dimensions is problematic. Understanding the value of freedom of religion as primarily the protection of

³⁸ *Hasan and Chaush v. Bulgaria* (2002) 34 E.H.R.R. 55 (emphasis added).

³⁹ *Canea Catholic Church v. Greece* (1997) 27 EHRR 521 (Commission Decision)

⁴⁰ *Metropolitan Church of Bessarabia v Moldova*, (2002) 35 EHRR 13.

a zone of privacy is in tension with what we can call the ‘collective dimension’ of organized religion. The ECtHR has recognized that “religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin.”⁴¹ Indeed, the ECtHR regularly emphasizes that states should not underestimate the importance of the community dimension of the right.⁴² Whilst we have seen that the Court said that “religious freedom is primarily a matter of individual conscience” the Court went on to say, in the same case, and immediately following this, that Article 9 “also implies, inter alia, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares”.⁴³

How do the courts address the relationship between the protection of an individual private right, and claims based on the protection of this collective dimension? The answer, unfortunately, is “in some confusion”, and in a multiplicity of voices. One approach is to seek to individualize the collective dimension. Freedom of religion in its collective dimension is seen as important partly because it furthers the autonomy of the individual. So, the Court has said that: “... the autonomous existence of religious *communities* ... directly concerns ... the effective enjoyment of the right to freedom of religion by all its active *members*. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the *individual's* freedom of religion would become vulnerable.”⁴⁴

In other cases, however, the Court considers that freedom of religion in both its individual and collective aspects is important for a third main reason, that such freedom is in the interests of the society as a whole, not just in the interests of the individual believer or collectively organized religion. In particular, the Court has viewed the collective aspect of freedom of religion as going beyond safeguarding the particular religious community in question, considering that “it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”⁴⁵ “Indeed,” the Court says, “the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.” For the ECtHR, it is important to protect “the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts”.⁴⁶ To repeat, this does not mean that the state (or the Court) is called on to approve the religious

⁴¹ *Hasan and Chaush v. Bulgaria* (2002) 34 E.H.R.R. 55, at [62].

⁴² *Kokkinakis v. Greece* (1993) 17 EHRR 397, para 31.

⁴³ *Hasan*, at [60].

⁴⁴ *Hasan* at [62] (emphasis added).

⁴⁵ *Moscow Branch of the Salvation Army v. Russia*, para 57.

⁴⁶ *Moscow Branch*, para 61.

beliefs; it is the existence of the variety of beliefs that is important, presumably irrespective of whether they are “correct” or not.

We can see, therefore, that there are three main approaches that characterize the ECHR’s interpretation of Article 9: an approach based on maintaining civil peace; an approach based on securing protection of private choices; and an approach based on ensuring the pluralism of the public space. The Court draws on each of these in its jurisprudence but has never, to my knowledge, made clear which, if any, has priority over the others, and the precise relationship between them remains largely unresolved.

Teleology of religious discrimination protections

Religion often becomes, independent of belief, a social status, a badge of identity, similar in many ways to other forms of identity, such as ethnic or cultural identity. Not surprisingly, therefore, arguments concerning the place of religion in the public or private spheres are now frequently reframed as issues of discrimination and equality. This appears to be the result of at least two significant developments. The first is that legal practitioners now more frequently identify anti-discrimination arguments as providing ways of avoiding the uncertainties engendered by the jurisprudence on freedom of religion. The second is that the growth of equality and discrimination arguments generally, and in particular the greater focus on the protection of various identities, has brought to the fore the ‘identity’ dimensions of religion.

Several similarities between freedom of religion and freedom from discrimination on the basis of religion are initially quite striking. There is, in particular, a degree of overlap between the interpretation of freedom of religion and the religious discrimination provisions in so far as freedom of religion itself encompasses an equality dimension. We have seen that freedom of religion has been interpreted as encompassing a degree of equality between religions. Indeed, one of the ways in which a breach of freedom of religion is proven is by pointing to more favourable treatment being accorded to another religion when, other things being equal, they should have been treated similarly.⁴⁷ This

⁴⁷ Under Article 9 ECHR, states cannot unreasonably discriminate between religions with regard to the requirements that the church must fulfill (*Canea Catholic Church v. Greece* (1997) 27 EHRR 521 (Commission Decision)). So, Article 9 safeguards the right of one religion to be free to operate on conditions equal to other recognized churches, especially where the action of the State causes an unjustified restriction on the exercise of religious freedom in its collective dimension (*Metropolitan Church*). The US Supreme Court has also frequently adopted a non-discrimination approach in interpreting the First Amendment’s religion clauses: *Widmar v Vincent*, 454 US 263, 269 n. 6 (1981); *Lamb’s Chapel v Center Moriches School District*, 113 S Ct 2141 (1993); *McDaniel v Paty*, 435 US 618 (1978). See further, JA Sekulow, JM Handerson, and KE Broyles, Religious Freedom and the First Self-Evident Truth: Equality as Guiding Principle in Interpreting the Religion Clauses, 4 *Wm & Mary Bill Rts J* 351 (1995-6), at 391, fn 231

intuition is captured in the ECHR through Article 14, the original intention of which was to provide that these substantive rights should not been delivered in a discriminatory way.

Beyond these similarities, however, textual differences emerge. In Article 9, freedom of religion (along with thought, conscience and belief) is singled out for special treatment, in the sense that freedom of religion has a particular provision that is devoted primarily to enunciating this freedom, whereas the provision prohibiting religious discrimination is located among several other grounds for non-discrimination, including race, gender, etc. A second difference is more institutional -- unlike the treatment of 'freedom of religion', freedom from religious discrimination has, in the past, often been the subject of detailed legal treatment in ordinary statute law as well as being sometimes addressed through constitutional or human rights provisions.⁴⁸

In light of this, there are two major problems in identifying the *telos* of the anti-discrimination approach when applied to religion. The first is the relationship between 'freedom of religion' and 'freedom from religious discrimination'. Is there anything *fundamentally* distinctive between these rights? Do the differences in drafting and institutional elaboration discussed above denote a significant substantive difference? Or do the two rights seek to do essentially the same thing? In short, does it matter whether an issue is presented as one of freedom of religion, or one of religious discrimination? The second problem arises from concerns about the internal coherence of the protectorate included in anti-discrimination law. Anti-discrimination law frequently prohibits discrimination against an expanding list of protected categories. We might seek to explain the inclusion of religion as a protected category simply as the result of interest-group lobbying, political influence, and historical contingency, but whether or not that approach accounts for the development in a way that convinces historians and political scientists, it has not proven sufficient for lawyers and judges, who tend to assume that, if there is a list, then there is some principled connection between the grounds protected that goes beyond historical contingency and politics.

Relationship between 'freedom of religion' and 'freedom from discrimination'

I'll consider, first, the relationship between 'freedom of religion' and 'freedom from discrimination', and suggest that the differences between these provisions are more fundamental than simply differences in drafting style, material scope, legal source, and limitations, however important these are in practice. The potential differences between the two rights also appears to have been recognised, at least to a limited extent, in legislative

⁴⁸ Scholarly discussion has frequently identified how little sustained jurisprudential analysis has been accorded to this approach in contrast to the massive scholarly attention accorded to freedom of religion. Little academic attention has been given to the inclusion of religion as one of the protected categories in anti-discrimination law.

drafting. In both European Union and UK anti-discrimination law, there are several exceptions from the religious anti-discrimination provisions aiming to ensure that freedom of religion is not breached,⁴⁹ thus indicating that the two rights are thought to incorporate different principles. Turning to the way in which these types of provisions have been judicially interpreted, we notice several differences between these provisions.

First, the discrimination provisions are interpreted as being essentially comparative.⁵⁰ The approach adopted to the interpretation of the religious discrimination provision emphasizes the nature of discrimination as involving the less favourable treatment of one person *in comparison* with another person, based on the differences in their religion. We saw that approach being adopted by the Court in *Ladele*. Freedom of religion protections, on the other hand, are not seen as *essentially* comparative. There can be a breach of a provision guaranteeing freedom of religion, irrespective of the same treatment being accorded (or not accorded) to adherents of all other religions, or, indeed, everyone else. Freedom of religion, at least in theory, protects the holding of a belief of that religion and its manifestation on a non-comparative basis; someone complaining of a breach of freedom of religion does not need to complain that someone else has been treated more favourably.

There is a way of thinking about a second possible difference between freedom of religion and religious anti-discrimination approaches by using an analogy drawn from sexual orientation. There has long been an important debate within the community of gay activists in Europe, as well as elsewhere, as to the appropriate strategy to adopt in addressing the treatment suffered by those who are gay. Essentially, the alternatives were whether to adopt a strategy based on an argument from privacy, or one based on equality.

In the early days of gay legal activism, the argument from privacy was highly successful in challenging the criminalization of sexual practices, particularly those associated with male homosexuality, such as sodomy. The essence of the argument from privacy was that the right to privacy protected activities within a zone of sexual intimacy from state regulation because what one did within that zone of sexual intimacy was, quite simply, not the law's business. The advantage from an activist's perspective was that (conservative) judges were not called on to approve what was done within that zone of privacy, simply tolerate it. This tolerance was based on the need to recognize the

⁴⁹ Compare the exception in the case of employment by an organization that has a particular religious ethos to permit such organizations to discriminate on the basis of religion or belief, but only where the nature of those activities or the context in which they are carried out, constitutes a genuine occupational qualification.

⁵⁰ With the notable exception of certain forms of gender discrimination, in some jurisdictions, such as pregnancy discrimination under European Union anti-discrimination law.

desirability of protecting the free choices of autonomous individuals within the zone of sexual intimacy.

The perceived *disadvantage* of the argument from privacy for gay activists was that it appeared to provide very little opportunity to challenge other restrictions on homosexuals successfully (other than those on same-sex sexual conduct, that is). After the initial success of the privacy strategy in striking down criminal sodomy laws, the privacy strategy was considered by many to be too limited in what it could be used to achieve. Even more importantly, however, it was not just limited, but also limiting, in that it appeared to conceptualize the relationship between gays and the wider society only in terms of sexual intimacy, and only in terms of protecting conduct rather than status. Once gays came out of the closet, into the public domain, into the light, then the privacy argument had very little purchase: privacy did not protect homosexuals from being treated badly, it only protected particular actions associated with homosexuals from being penalized (provided they were in private).⁵¹

The alternative approach that came to dominate gay rights litigation was based on discrimination and equality rather than privacy. A shift to equality would mean that gay activists would no longer have to focus on the particular substantive right of privacy as the basis for challenging particular treatment, but instead would concentrate on the use of the “status” of sexual orientation, similar to the way in which the use of race or gender or disability came to be seen. This shift to equality was considered to be attractive, in short, because it provided an opportunity to focus on homosexual status rather than homosexual sexual practices alone; it protected gays in the public sphere (as opposed to only in the bedroom) and, because it was based on a conception of discrimination that was comparative, it emphasized, on every occasion, that the starting point for analysis was that homosexuals and non-homosexuals should be treated as equivalent.⁵²

This opportunity to validate rather than just tolerate gays was taken up with enthusiasm by gay activists, leading to considerable advances in the perception of homosexuals, who were reclassified (as it were) to become a group worthy of protection, in ways very similar to women, racial minorities, and so on. In this sense, Justice Scalia was correct in *Romer v Evans* when he said: “Quite understandably, they [meaning gay activists] devote ... political power to achieving ... not merely a grudging social

⁵¹ John Finnis described this position in 1994 as ‘the standard modern position. He supported decriminalization of private homosexual conduct, whilst rejecting the equation of homosexuality with heterosexuality as equivalent, see John M Finnis, Law, Morality and ‘Sexual Orientation’, 69 *Notre Dame Law Review* 1049 (1994).

⁵² See, for example, Larry Cata Backer, Exposing the Perversion of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration, 45 *Florida Law Review* 755 (1993).

toleration, but full social acceptance, of homosexuality.”⁵³ Quoting Jacobs, he considered “[t]he task of gay rights proponents is to move the center of public discourse along a continuum from the rhetoric of disapprobation, to rhetoric of tolerance, and finally to affirmation”.⁵⁴ Adopting equality as the basis for its legal strategy contributed to this goal. “Affirmation” means that these particular choices are not just accepted, but are also regarded as “right”, such that we cannot reject them, and the state (through the courts) is seen to prefer that view over a contesting view.

How is this diversion relevant for an analysis of claims to *religious* discrimination? A significant part of the appeal for litigants in using an argument based in freedom from religious discrimination is the opportunity it offers to benefit from similar affirmation of their status as religious persons, particularly when they operate in the public sphere, broadly defined. The opportunity to secure affirmation is notoriously more limited using freedom of religion. Not only is there an ambiguity as to whether the courts will apply a narrow ‘autonomy’ approach, significantly limiting religion to the private sphere, there is also a focus on particular ‘conduct’, viz the manifestation of a set of religious practices, rather than a protection of the status of being religious in the much broader range of circumstances covered by anti-discrimination law.

Grounds of protection in anti-discrimination law

Whilst the benefits for conscientious-believer litigants appear to be clear, there remains a significant problem, however. This is the problem of how far, if at all, courts are willing to see religion as truly analogous to other grounds that they regard as appropriately protected by anti-discrimination law, such as race, or gender, or sexual orientation. This requires us to consider the second problem in understanding the *telos* of freedom from religious discrimination. Trying to explain why some grounds are included within the protectorate of anti-discrimination law, whilst others are not, has generated a substantial debate in different jurisdictions, one that is by no means over.

Initially, the predominant academic explanation in several jurisdictions outside the United States followed that adopted by the United States Supreme Court: the common element that linked those grounds that were protected by anti-discrimination law, and that distinguished these from other grounds that were not protected, was said to be that the grounds that were included in the protectorate were all ‘immutable characteristics,’ meaning that these characteristics were not chosen and could not be altered by an individual. In 1969, the *Harvard Law Review* observed that “... race and lineage are

⁵³ *Romer v. Evans*, 517 U.S. 620, 646 (1996).

⁵⁴ Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969-1991*, 72 *Neb. L. Rev.* 723, 724 (1993).

congenital and unalterable traits over which an individual has no control and for which he should not receive neither blame nor reward.”⁵⁵

The immutability theory has important implications for how we are likely to view the inclusion of “religion” in the grounds of protection, because it radically distinguishes racial discrimination from much religious discrimination. Whereas the latter is thought to protect individuals because they act on the basis of freely made choices, the former protects individuals because they were acted upon on the basis of characteristics that were not freely chosen because immutable. It is this distinction that surfaced some years ago in the British courts, when Lord Justice Sedley in *Eweida v. British Airways*⁵⁶ distinguished protection from discrimination on the grounds of age, disability, gender reassignment, marriage and civil partnership, race, sex and sexual orientation, from protection from discrimination on grounds of religion or belief. He observed: “One cannot help observing that all of these apart from religion or belief are objective characteristics of individuals: *religion and belief alone are matters of choice*.”⁵⁷

In the place of its birth, the “immutability” theory has, however, long been regarded skeptically, as being both under- and over-inclusive. Lawrence Tribe’s comment demonstrates how it is *over*-inclusive: “Intelligence, height, and strength are all immutable for a particular individual but legislation that distinguishes on the basis of these criteria is not generally thought to be constitutionally suspect.”⁵⁸ Jack Balkin’s analysis points to why it is *under*-inclusive: “Discrimination against blacks ... is not unjust simply because race is an immutable characteristic. Focusing on immutability per se confuses biological with sociological considerations. It confuses the physical existence of the trait with what the trait means in a social system ... The question is not whether a trait is immutable, but whether there has been a history of using the trait to create a system of social meanings, or define a social hierarchy, that helps dominate and oppress people. Any conclusions about the importance of immutability already presuppose a view about background social structure.”⁵⁹

Attempting to isolate a principled reason why some groups are protected from being discriminated against and others not, brings us face to face with a major unresolved issue in anti-discrimination law theory: what is it that anti-discrimination law is attempting to do? Whilst the ‘immutability’ theory has lost support, there has been no single alternative

⁵⁵ Developments in the Law: Equal Protection, Harvard Law Review 82: 1065, 1126-1127.

⁵⁶ [2010] EWCA Civ 80.

⁵⁷ At [40].

⁵⁸ L.H. Tribe (1980), The Puzzling Persistence of Process-Based Constitutional Theories, *Yale Law Journal* 89:1063, note 51. Similarly Owen M Fiss, Groups and the Equal Protection Clause, 5 *Philosophy and Public Affairs* 107, at 125 (1976), and Ronald Dworkin, *Law’s Empire* (1986), at 394-95.

⁵⁹ J.M. Balkin (1997), The Constitution of Status, *Yale Law Journal* 106: 2313, 2365-2366.

that has emerged as a commonly accepted replacement, at least in the European context. Instead, several major competing theories have attempted to answer this question.

One theory is that the protected characteristics comprise a list of those characteristics that are irrelevant to the performance of a job, or to the distribution of a benefit, and that it is therefore the use of these characteristics should be prohibited in these contexts. This approach focuses on the function of anti-discrimination law on eradicating irrational decision-making, and requiring decision makers to act on the basis of “merit”. This explanation has always carried a powerful punch, because protection from discrimination on this basis is not just for the benefit of the individual who is protected, but it is also in the general interest that only relevant criteria should be adopted. And in the context of religion, we can also see that this approach has considerable resonance -- it is, in some contexts, simply irrelevant what a person’s beliefs (religious or not) are. To this extent, there is a clear overlap between the concern to protect freedom of religion and the concern to prohibit discrimination on religious grounds: both are concerned with preventing others (the state, an employer) from messing with a person’s set of beliefs unless this is absolutely necessary. In this theory, whether or not the protected characteristic was the result of free choice by the ‘victim’ was not important; rather, what was important was the relevance of the criterion to the choice made by the decision-maker.

The argument from irrelevance is not, however, particularly convincing if it is presented as a complete explanation for the inclusion of the list of protected characteristics usually covered, not least because in some cases the use of a protected characteristic *is* highly relevant but is still prohibited (think of the prohibition of some actuarial calculations based on gender of pension contributions under European Union law⁶⁰). In the context of the prohibition of religious discrimination, the “irrelevance” theory is also unconvincing as an all-encompassing explanation, because religious discrimination is prohibited in employment even where it is “relevant”, such as where an employer is prohibited from discriminating against a person on grounds of his or her religion even where the employer’s customers would strongly prefer not to have a person of that religion serving them. For the employer to take the employee’s religion into account in deciding whether to hire that person could not be described as “irrational”, or based on “irrelevant” considerations. We prohibit the employer from so acting *in spite of* it being relevant in some circumstances.

Of the alternatives to the “irrelevance” theory, two others have proven of particular importance. Both of these involve, to some degree, a collective dimension. When the paradigmatic grounds of anti-discrimination law were race and gender, the most popular alternative theory was probably one based on “redistribution” to particular disadvantaged groups. This theory captured the idea that the function of anti-discrimination law was a

⁶⁰ Case 236/09, *Test-Achats*, judgment of 1 March 2011, [2011] 2 CMLR 38.

modest redistribution of opportunities for employment, housing, and other benefits from advantaged to disadvantaged groups. The source of the disadvantage was clear -- it was the race or the gender of the person -- and therefore it was appropriate to prohibit the use of those characteristics that would result in these groups being even more disadvantaged. Owen Fiss termed this approach, the “group disadvantaging principle”. This principle, and its similar cousins, concentrated on the disadvantage (often economic) that the group suffered or would suffer, and associated that disadvantage with the fact that the group was identified by its possession of the prohibited characteristic.

The “group disadvantaging principle” explains the inclusion of religion in Europe only to a limited extent. So, in Northern Ireland, where religion plays a social role equivalent to ethnicity and there was a significant connection between being Catholic and being disadvantaged, the group-disadvantaging principle explains and justifies the inclusion of religion in anti-discrimination law. So, too, where there is a strong connection elsewhere between ethnicity, religion and economic disadvantage, such as we see as regards the position of Muslims in Britain, prohibiting religious discrimination seems to map neatly onto the group disadvantaging principle. Except in these contexts, however, the redistributive approach seems singularly ill-suited to explain the inclusion of ‘religion’ as a *general* category of prohibited characteristic.

A more recent theory, and probably the most popular currently, is the theory of protection based on the desirability of protecting “minority identity”. Unlike the “group disadvantaging principle,” this seeks to explain the categories of protected characteristics by focusing on the importance of protecting social groups with which individuals self-identify and of which they behave as a part, adopting the shared attitudes and practices of the group to such an extent that their membership in the group becomes an important part of how they view themselves. These identities should be protected, it is said, because discrimination on the basis of this identity is an attack on a central aspect of the personality of those whose self-identity is tied up with the group. Not all identities are protected, of course, only those that are particularly associated with a ‘minority’ group, with ‘minority’ in this context often being a proxy for “those who are *disadvantaged* as a result of their minority status”.

This theory seems particularly well suited to the inclusion of grounds such as sexual orientation within the protectorate of anti-discrimination law. The legal move from using privacy to using equality arguments in the context of sexual orientation coincided with a social movement that increasingly saw sexual orientation as an identity rather than simply as a description of sexual conduct. The development of sexual orientation as a mark of identity made it that much easier to incorporate it as a protected ground of discrimination. With that move, the issue ceased to be whether sexual orientation was chosen or not, or

whether sexual orientation was an “immutable characteristic” or not.⁶¹ And it was clear that the group was a “minority”, whose members were disadvantaged by being part of that group. And such an approach is not entirely absent from the jurisprudence of the ECtHR. We have seen earlier that the ECtHR, when considering freedom of religion, accepts the connection between religion and identity. Protecting religious choices is seen as important not only because we respect autonomy, but also because these choices relate to the individual’s identity. So far, however, the identity-based approach has not been extensively tested in the ECtHR as an appropriate interpretation of Article 14’s prohibition of religious discrimination, and its likely adoption by the Court is uncertain.

If the interpretation by British courts of prohibitions on religious discrimination is any basis for predicting future trends elsewhere, including in the ECtHR, equality norms in the context of religion will be seen, rather, as simply another way of putting the freedom of religion approach into practice, and therefore as something of an anomaly in the equality law sphere. So, in recent British cases, for example, the anti-discrimination provisions dealing with religion have been interpreted as encapsulating a choice-based approach borrowed directly from freedom of religion rather than an identity-based approach borrowed from race cases. So too, the provisions are interpreted as encapsulating a view that religion is a private matter rather than a public matter, again borrowing directly from freedom of religion; and as focused on conduct rather than identity, again borrowed directly from freedom of religion. What seems to emerge from what is, admittedly, still a somewhat patchy jurisprudence is an approach that seeks to distance religious equality from all the other types of status equality, and to relegate religious equality to become simply another variant of freedom of religion, and therefore subject to the same type of constraints as freedom of religion.

This emerging approach, if such it is, seems to be due in part to structure of Article 14 itself. As we have seen in the discussion of *Ladele*, Article 14 is parasitic on other Convention rights, meaning that the Court has determined that Article 14 does not come into play unless the case raises an issue that is at least “within the ambit” of another Convention right. The early jurisprudence of the Court of Human Rights generally viewed the function of Article 14 as peripheral and subsidiary to the other substantive rights. Indeed, the Court in this early phase seems to have regarded the role of Article 14 as essentially a way of ensuring that the fundamental right in issue was more widely distributed, rather than being important in its own right. This is an important reason why, in so many early cases, an Article 14 claim was not decided on its merits after it was found that that another substantive right had been breached -- Article 14 was not thought to bring

⁶¹ Adopting either position would have been problematic for (some) gay rights advocates who were radically split on the issue, see Janet E Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 26 *UCLA Law Rev* 915 (1989).

anything additional to the table. In the context of litigation involving a claim of religious discrimination, a classic move was to argue that the case raised issues within the ambit of Article 9 on freedom of religion, rather than some other Article, and thus the scene was set for Article 9 to become the dominant focus of attention, replacing the Article 14 discrimination issue.

The approach that regards Article 14 as subsidiary and peripheral has more recently been significantly modified, and eradicating certain types of status inequality is often now seen as a worthy goal in itself. This approach has come to dominate the adjudication of claims based on race, gender and sexual orientation. These grounds (and some others) are considered by the Court to merit a particularly high degree of protection because adverse treatment based on these grounds is thought to merit particular condemnation. In these cases, the function of Article 14 is not to act as merely ancillary to the other substantive rights but to take on a role in protecting individuals from particular types of status discrimination. When engaging with discrimination on these grounds, the Court now interprets Article 14 in ways much more similar to the classic statutory anti-discrimination law provisions in domestic law, such as those prohibiting racial and gender discrimination. In the ECtHR, when an Article 14 claim engages this set of grounds (race, gender, etc) there is a clear ‘restriction in the national margin of appreciation’.⁶²

And, again, this approach is not absent from Article 14 jurisprudence engaging with religious discrimination. We have seen that in several cases the Court has interpreted Article 14 read with Article 9 in somewhat similar ways, in particular where it would appear from the facts of the case that the power of the state was being used to allow one religion to dominate another. Thus the well-known prejudice against non-Orthodox churches in Greece,⁶³ and Jehovah’s Witnesses more generally,⁶⁴ has led the Court to identify these religions as, effectively, ‘minorities’ and thus subject to greater protection. In these contexts, where heightened scrutiny is required, the Court is also more likely to impose a positive obligation on the state to protect these minority religions from non-state actors,⁶⁵ and impose an obligation of reasonable accommodation on the state.⁶⁶ Where the Court does not view the religious anti-discrimination claim as involving, in effect, a claim to disadvantaged minority group status, the Court does not appear to be willing to grant the claimant membership of a “suspect category”, and is anxious to allow to states a wide margin of appreciation. The Court’s approach, therefore, is very context driven.

⁶² Frédéric Edel, *The prohibition of discrimination under the European Convention on Human Rights*, Council of Europe Human Rights Files, No. 22 (2010), 140.

⁶³ *Canee Catholic Church v Greece*, 16 December 1997.

⁶⁴ *Hoffmann v Austria*, 23 June 1993; *Palau-Martinez v France*, 16 December 2003; *Religionsgemeinschaft de Zeugen Jehovas and others v Austria*, 31 July 2008; *Gidani Congregation of Jehovah’s Witnesses and 4 Others v Georgia*, 3 May 2007.

⁶⁵ *Gidani Congregation of Jehovah’s Witnesses*, *supra*.

⁶⁶ *Thlimmenos v Greece*, Grand Chamber, 6 April 2000.

Ladele: confusing freedom of religion with freedom from religious discrimination

That is why we have cases such as *Ladele*, in which the Court appears to understand the *telos* of the religious discrimination provision as the same (or very similar) to that of freedom of religion (and thus, crucially, bringing the same limitations into anti-discrimination law as occurs in freedom of religion. This was the approach adopted in the English Court of Appeal, and it will be remembered that the ECtHR essentially incorporated of the English Court of Appeal's justifications for refusing to uphold her claim of discrimination into its judgment. There are several important examples.

First, the national court, it will be remembered, specifically stated that Ms Ladele's refusal to carry out same sex partnership ceremonies "caused offence to [her] gay colleagues." Second, the national court stated that the local authority's requirement that she should carry out this duty "did not prevent her from worshipping as she wished." In a freedom of religion context, both these justifications might (just) be acceptable (based on the avoidance of civil strife and the privacy rationales), but neither of them has hitherto been regarded as acceptable in an anti-discrimination law context in so far as discrimination on other grounds is concerned. We do not accept as a justification for indirect racial discrimination that the act or omission that the person of colour wishes to do or not to do will cause "offence" to others. Nor, in the gender discrimination context, would we regard the woman's ability to do *other* things as relevant to whether she was discriminated against in doing *this* thing.

Third, the national court states that one of the reasons for regarding the discrimination as justified was that she was "working for a public authority". This seems to imply that public authorities should be neutral work places in which religious values should remain excluded. And much freedom of religion jurisprudence seems to follow this line of thinking, viewing the protection as essentially guaranteeing the right to *private* religious practice, following a dominant stand of the "secularization" literature in doing so. As societies modernize, we are told, they should lose the vestiges of public religion and ultimately become committed to secularism. Religion becomes publicly marginalised – or, "privatized" – and 'excluded from the public realm.'⁶⁷ This approach may be consistent with a narrow freedom of religion approach, in which the state's duty (and possibly the duty of its employees) is to remain neutral, but it seems a very strange approach to adopt in the anti-discrimination context. I have never encountered a judicial decision in any other anti-discrimination context that accepts that indirect discrimination can be justified by the fact that the employee is an employee of that state body.

⁶⁷ Jeffrey Haynes, *Religious Transnational Actors and Soft Power* (Ashgate, 2012), 1, emphasis added.

Fourth, it will be remembered that the ECtHR says that the Court “generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights ...”.⁶⁸ But the Court here again demonstrates a significant confusion. Remember that the Court accepted the applicant’s position that the issue that Ms Ladele presented was a discrimination claim, not a freedom of religion claim. And recollect that the local authority’s policy was essentially grounded in the avoidance of discrimination. This means, therefore, that in *Ladele’s* case there were *no* competing Convention rights (in the sense of a clash between Article 14 and Article 9), but rather competing aspects of the same Convention right, the Article 14 right not to be discriminated against. The Court avoids considering how best to deal with conflicts within the right to non-discrimination, by lazily considering the issue as one of competing Convention rights.

Fifth, the English Court of Appeal states that the duties that Ms Ladele was required to perform, involved “purely secular tasks,” and that her refusal to carry them out was “not based on a core part of her religion.” Both of these aspects of the justification also sound in freedom of religion jurisprudence, not in anti-discrimination jurisprudence. In both cases, their inclusion in the list that the national Court brought forward to justify indirect discrimination, a list that we have seen the ECtHR appears to incorporate by reference into its own judgment, seems calculated to undermine the initial finding that there was a *prima facie* case of discrimination. Even assuming it is correct that she was involved in “purely secular tasks” and that her refusal was not based on a “core part of her religion”, why are either of these points relevant in an anti-discrimination context, except at the stage of determining whether there is a *prima facie* case of discrimination? The ECtHR having, quite correctly, adopted a clear understanding of what it was necessary for Ms Ladele to establish at the *prima facie* stage, then seems to row back, bringing back into consideration at the justification stage just those types of considerations that were rejected at the *prima facie* violation stage. The only plausible explanation seems to be that these types of considerations might be relevant at the justification stage of a freedom of religion claim, which would seem to illustrate either that the Court is hopelessly muddled in its approach, or that something more intriguing is going on.

What that “extra something” may be, is difficult to pin down, as there is nothing in the Court’s judgment in *Ladele* that even hints at an explanation. Two possibilities come to mind, however. First, the unacceptability of some religious beliefs might be thought to be sufficient in itself to distinguish the ground of “religion and belief” from other protected characteristics, and this may lead courts to push religious discrimination claims back to the safer shores of freedom of religion where there is more experience of dealing with bigoted

⁶⁸ *Eweida*, para 106.

religions. Gwyneth Pitt, for example, argues that unlike other protected grounds, which “express a consensus about particular values of equality and the irrelevance of certain characteristics,” the protection of religion and belief “potentially provides protection for the holders of completely abhorrent, or irrational, or bigoted beliefs, including those which would certainly not accord equal rights to others if they were to prevail”, and that this “highlights a difference between the religion or belief ground compared with other protected grounds.”⁶⁹

The Court may thus be interpreting the prohibitions on religious discrimination in what they consider to be a very different context from that in which they interpret the laws prohibiting racial or gender discrimination. Up to this point, they have become used to seeing religious discrimination primarily in an ethnic minority context, and seem to have considerable difficulty in accepting that religious identity is a status that is to be protected irrespective of whether that religious identity is connected with a minority ethnic identity or not. In addition, even when the religious discrimination claim does arise from a community that is a minority ethnic community, the claim to protection is met with a post-multicultural scepticism, particularly where any whiff of illiberalism in the religious practices of that group is perceived to be operating.

If this is what is going on, then it would seem that, in the long run, the language and claims of nondiscrimination and equality may be of greater harm than help to religious claimants. Equality language and anti-discrimination claims bear the impression of certain core progressive commitments that do not sit at all easily with the views of some religious believers. But it is contrary to the state’s (and the Court’s) duty of neutrality and impartiality to allow the state (or the Court) to assess the legitimacy of a system of religious beliefs, or the way in which those beliefs are expressed, and the Court is more likely to prefer dealing with the problem in another way, such as viewing the claim through the narrower lens of freedom of religion.

A second possible explanation for the unease in treating religious discrimination claims as on a par with claims of discrimination on other grounds (except where such claims are closely related to racial and ethnic discrimination) may be because of the wider implications of doing so. Perhaps sensing that they are likely to get into highly problematic water if religious discrimination litigation becomes widespread, the ECtHR has avoided these future problems by invoking the margin of appreciation, thus leaving the issue to the national authorities.⁷⁰ The Grand Chamber adopted a similar approach in *Lautsi*, the case dealing with the display of the crucifix in Italian public school classrooms.⁷¹ One way of

⁶⁹ Gwyneth Pitt, Religion or belief: aiming at the right target, in Helen Meenan (ed), *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (Cambridge, 2007), 202 at 213.

⁷⁰ *Eweida*, para 106.

⁷¹ *Lautsi v Italy*, (2012) 54 EHRR 3.

interpreting such decisions is to view the Court as according to European states considerable discretion to weigh religious values according to their own criteria of evaluation, thus giving discretion to states also as to how to deal with the problem, and allowing to Court in particular to avoid dealing with the highly sensitive issue of established (or quasi-established) religions in many states.

Whilst this approach may satisfy those concerned with protecting national sovereignty,⁷² it does little to address other understandings of why religion should be protected since it places the *state* in the driving seat, allowing it to decide which, if any, religious values to uphold. It seems, if anything, a throwback to the original approach to freedom of religion adopted in the Treaty of Westphalia, in which princes got to determine the religion of the populace in their territories. So, for example, the ECtHR's use of the margin of appreciation to address issues concerned with abortion,⁷³ or the wearing of Islamic dress,⁷⁴ or conscientious objection to same-sex relationships,⁷⁵ recognizes the diversity of the values upheld in different *national* traditions. As the ECtHR stated in the *Leyla Sahin* case, concerning the wearing of Islamic dress: "Rules in this sphere will consequently vary from one country to another according to *national* traditions and the requirements imposed by the need to protect the rights and freedoms of others and so maintain public order ... Accordingly, the choice of the extent and form such regulation should take must inevitably be left up to a point to *the State* concerned, as it will depend on the specific domestic context."⁷⁶ But this does little to ensure that human rights norms will protect "religious values" that a state does not value. And, with some notable exceptions, the theoretical literature emanating from anti-discrimination scholars has been unsympathetic to the dilemmas and inconsistencies this generates, distorted as it sometimes is by a lack of sympathy for religious thought in secular scholarship. This has led to a lack of theoretical progress, a kind of politico-theoretical deadlock, which has muddled our thinking on both anti-discrimination law and religion.

IV. ADDRESSING THE TELEOLOGICAL PROBLEM IN RELIGIOUS ANTI-DISCRIMINATION LAW

It is often said that it is easier to tear down than to build up. Having, I would like to think, deconstructed the *Ladele* decision, and successfully critiqued significant elements of the ECtHR's religious discrimination jurisprudence, prudence would suggest that I leave it at that. But that strategy, although attractive, seems somewhat cowardly, and in this final

⁷² Although, even here, the extent of the Court's discretion in choosing whether and how to allow this margin of appreciation renders it suspect. In the abortion context, for example, the ECtHR has become somewhat less generous in the extent of the margin appreciation allowed to states, e.g. *A,B,C v Ireland*, (2011) 53 EHRR 13.

⁷³ *Vo v France*, Application no. 5392/00, Grand Chamber, 8 July 2004, (2005) 40 EHRR 12, at 82.

⁷⁴ *Leyla Sahin*, (2007) 44 EHRR 5.

⁷⁵ *Eweida*.

⁷⁶ *Leyla Sahin v Turkey*, at 109 (emphasis added)

part, I will suggest that there is an alternative approach which is both workable and attractive. We should aim to identify strategies that enable a true dialogue to take place over precisely these most contested questions in human rights law, including what to do in the *Ladele*-type situation, with practical implications for how dialogue is conceptualized and practiced, by organized religion, the courts, and the academic community. The central questions that this Part addresses are what true dialogue involves, and what the courts could do to encourage such a dialogue rather than close it down.

Dialogue

Bradford Hinze contrasts two approaches to communication: “a dialogic mode ..., in which messages oscillate between participants, and discursive modes, in which a message flows from sender to receiver.”⁷⁷ In the latter, “[s]peakers are not required to listen and listeners are not required to speak. There is no open-ended mutuality, no chance for all parties to learn, for participants to be influenced by each other leading to mutual growth.” However, Hinze also crucially distinguishes between two different ways in which dialogic communication has come to be understood. One mode of dialogue “draws on classical Platonic, Augustinian, and personalist theories of dialogue,” and is seen as “able to guarantee and safeguard the weight of truth in dialogue.”⁷⁸ Another mode of dialogue is seen “risk[ing] placing the truth of tradition in jeopardy.”⁷⁹ The former, according to Hinze, is a “medium for transmitting and conveying the truth of tradition already established” as opposed to the latter that advances “an approach to dialogue [that is] interested not only in handing on but also in generating, developing, or revising the truth of the living tradition”⁸⁰ Hinze does not regard the former as constituting true dialogue, and I am equally sceptical.

The problem in engaging in a true dialogue in these terms is not confined to religious actors. We find a degree of fundamentalism on both sides. When both sides claim to speak the truth, but “the truths” appear to conflict, the stage is set for a stand-off, which may prove difficult to resolve. Lest it be thought that fundamentalism is restricted to religious believers, there is also a human rights law tradition that sees human rights as advancing a “comprehensive ideology”, as Michael McConnell has called it, in which there are “right answers” to be found.⁸¹ This approach is the basis for what some have seen as

⁷⁷ Bradford Hinze, *Practices of Dialogue in the Roman Catholic Church: Aims and Obstacles, Lessons and Laments* (Continuum, New York, 2006), p. 12. I am grateful to Timothy Radcliffe OP for bringing this to my attention.

⁷⁸ Hinze, p. 260.

⁷⁹ Hinze, p. 260.

⁸⁰ Hinze, p. 260-61.

⁸¹ Michael McConnell, Liberalism and People of Faith, in Michael McConnell, et al (eds), *Christian Perspectives on Legal Thought* (Yale University Press, 2001), 18.

justification for calling human rights the new civil religion. Giorgio Sacerdoti has described how, in his view, “[t]he ‘religion’ of human rights and fundamental freedoms has replaced other religions and beliefs as the underpinning of social life in contemporary societies.”⁸² Unfortunately, the British Parliamentary debates on the same-sex marriage legislation, following *Ladele*, demonstrated this fundamentalist approach to human rights. The position of the ECtHR in *Ladele*, that the question of whether registrars in her position should be permitted not to conduct such ceremonies, was an issue for the national authorities to consider, was seen, effectively, as giving an *imprimatur* to those who sought to put claims such as hers beyond the pale of acceptable debate. Rather than *Ladele* being seen as encouraging true dialogue, it came to be seen as not requiring any serious dialogue at all.

How should *human rights* be *practiced*, if we are to take seriously the idea of a true dialogue between secular and religious understandings of human rights? In particular, as Michael Ignatieff suggests, how can we best “stop thinking of human rights as trumps and begin thinking of them as a language that creates the basis for deliberation”?⁸³ If we aim to engage in a genuine dialogue in human rights practice in *Ladele*-type situations, what are the practical implications for the courts’ role? I suggest that taking three concepts more seriously would be an important starting point: pluralism, secularity, and accommodation.

Pluralism revisited

We have seen earlier that the ECtHR has viewed the collective aspect of freedom of religion as going beyond safeguarding the particular religious community in question, considering that “it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”⁸⁴ For the Court of Human Rights, this “pluralism,” we saw, is built “on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts”.⁸⁵ Although adopted in the context of freedom of religion, this aspect at least also seems particularly well suited to becoming also the appropriate *telos* of Article 14’s prohibition of religious discrimination, and it would not require too significant a shift of perspective to be fit for that purpose. In particular, the idea of “diversity” is one that has found a home also in the anti-discrimination context, as we have seen. Taken seriously, viewing the *telos* of religious anti-discrimination law as one of “pluralism” in this sense, could have significant effects in reorienting the

⁸² Giorgio Sacerdoti, *The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens’ Europe*, 8 *Columbia Journal of European Law* 37, 52 (2002)

⁸³ Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, 2003) 95.

⁸⁴ *Moscow Branch of the Salvation Army v. Russia* (2007) 44 EHRR 46, para 57.

⁸⁵ *Moscow Branch*, para 61.

interpretation of religious anti-discrimination law. Without attempting to be complete, there are two particular elements of a revised approach that should follow.

Secularity

The first involves replacing “secularism” with what I’ll call “secularity” as the appropriate aim for the relationship between state authority and religion in the public sphere. We saw earlier that recent theorizing on the future of religion suggested that modernization leads inevitably to secularization, but this is clearly false. Several developing countries that have modernized have deepened, rather than ditched, their commitments to religious identification (think of Malaysia). Societies in the West have seen a growth of religious diversification, where a plethora of new religious groups compete with each other and with older established world religions. And religion has increasingly been deeply embedded in what has been described as the clash of civilizations. Instead of the expulsion of religion from the public space, there has been a resurgence of a particular type of religious sensibility, one which seeks, as Jeffrey Haynes puts it, “the generalized ‘return’ of religion to the public realm”, what he terms “[r]eligious deprivatisation”.⁸⁶

Theories of secularization were, however, correct in at least one major respect. The continuing role of religion in public life *does* give rise to tensions with key aspects of modernity, not least with some aspects of human rights. However, the tensions arising between resurgent religion and human rights cannot be considered a transitional issue. On the contrary, they are likely to increase and fester if not addressed. Religions are a problem for human rights, and human rights are a problem for religions. And both, separately and together, are problems for courts. The issue, of course, is what to do about these trends.

There is a critical distinction between two different conceptions of what a secular State should aspire to look like. One possibility is what we might call “secularity”, and the other is a more comprehensive substantive viewpoint, which we can term “secularism”.⁸⁷ Brett Scharffs has explained this distinction in detail elsewhere,⁸⁸ but (in summary) “secularism” refers to an ideological position that is committed to promoting a secular order. Secularism is itself a positive ideology that the State may be committed to promoting, an ideology that may manifest itself as opposition to religiously-based or religiously-motivated reasoning by political actors, hostility to religion in public life, an insistence that religious manifestation should be relegated to an ever-shrinking sphere of

⁸⁶ Jeffrey Haynes, *Religious Transnational Actors and Soft Power* (Ashgate, 2012), 1, emphasis added.

⁸⁷ See BG Scharffs, ‘Four Views of the Citadel: The Consequential Distinction between Secularity and Secularism, Religion and Human Rights’ (2011) 6 *Religion and Human Rights* 109-126.

⁸⁸ *ibid* 110-11.

private life, or even an aggressive proselytizing atheism -- what has been called “secular fundamentalism.”⁸⁹

By contrast, “secularity” means an approach to religion-State relations that avoids identification of the State with any particular religion or ideology (including secularism itself) and endeavors to provide a framework capable of accommodating a broad range of religions and ideological beliefs. Secularity is a more modest concept, committed to creating what might be called a broad realm of “constitutional and legal space” in which competing conceptions of the good (some religious, some not) may be worked out in theory and lived in practice by their proponents, adherents, and critics. Those committed to secularity consider it to be preferable to secularism as a guide to the right relationship between religion and the State because we should be sceptical of utopian visions, and distrust those who seek to compel the implementation of an all-embracing vision of the good or right.

Secularism, in other words, should not become the State religion – explicitly or implicitly. The State should not attempt to promote a pristine secular order where the public realm is scrubbed clean of all religious residue. This is not only a dystopian vision of neutrality, which is often defined in terms of what is excluded rather than by what is included, it is not really “neutrality” at all, at least in any satisfying sense of the term. The reason secularity is a more attractive ideal is because it is not an ideology, but rather a framework for pluralism. If it is a conception of the good, it is a thin one. It does not say there is no “truth”, but rather that it is not the State’s job either to identify and promote a particular comprehensive truth, or to oppose it. “Secularity”, in my view, better describes the current theory of the ECtHR than does “secularism”, however imperfectly it puts that theory in practice.

Accommodation

More practically still, how can human rights courts begin to develop techniques to help stimulate a genuine dialogue that encourages secularity and furthers a pluralistic vision of the public space? Let’s return to the ECtHR’s decision in *Ladele*. The Court, in my view, was misguided in not developing the tool of proportionality in such a way as to enable it to deal with these claims. In this respect, the German, Canadian and South African courts provide a considerably better model of how to address these difficult cases, not least because they have identified human dignity as underpinning the claims of *both* those who are seeking to restrict religious practices, *and* those who are seeking to manifest their religious beliefs. As Sachs J said in *Christian Education South Africa*, “The right to believe

⁸⁹ Richard Ekins, *Secular Fundamentalism and Democracy*, (2005) 8(1) *Journal of Markets and Morality* 81 at 82.

or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. (...) [R]eligious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights."⁹⁰ This use of "dignity" thus enables a degree of commensurability to be identified between the values to be balanced in situations where there is an apparent clash of the rights protected. The solution adopted should be that which is most compatible with advancing "human dignity". Neither side of the debate is ruled out of court, there are no "outlaws", and respectful attention is given to the claims of both parties.

The Canadian and South African courts approach the interpretation of rights and interests in ways that attempt to create the maximum space for rights by, seemingly paradoxically, requiring both sides in the dispute not to push their rights or interests to the limit. This way of thinking about the role of rights in true dialogue has been taken up, for example, by Judge Albie Sachs in the South African Constitutional Court, when he sought to inject aspects of mediation into resolving rights disputes involving the ejection of squatters, because it was vital for all those involved in the dispute to recognize that they were involved in a community with each other.⁹¹ It is akin, also, to what the German Constitutional Court has termed the principle of "practical concordance". "This conflict among various bearers of a fundamental right guaranteed without reservation, and between that fundamental right and other constitutionally protected objects," the Court held in the famous *Classroom Crucifix* case, "is to be resolved on the principle of practical concordance, which requires that no one of the conflicting legal positions be preferred and maximally asserted, but all given as protective as possible an arrangement."⁹² Both rights, or in the case of disputes within the anti-discrimination principle itself, both aspects of equality, carry significant weight. They should therefore both be protected to the greatest extent possible, and this requires that each be accommodated to the greatest extent possible by the other. Only by each side "backing off" from making claims that assert its interests to the limit, can this be accomplished.

V. THE *LADELE* SITUATION REVISITED

What difference would an approach based on pluralism, secularity and accommodation make to the way in which the *Ladele* situation would be adjudicated? Several judgments in which this approach plays a central role illustrate how this could work

⁹⁰ At [36].

⁹¹ *Port Elizabeth Municipality v Various Occupiers*, 2004 (12) BCLR 1268 (CC), Sachs J, at [39]: '... one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.'

⁹² *Classroom Crucifix Case*, BverfGE 93 1; 1 BvR 1087/91, 12 May 1987 (German Constitutional Court), C.II.3a.

in practice, and is suitable for adoption in the context of anti-discrimination law. In *Multani*, for example, the Canadian Supreme Court struck down the order of a Quebec school authority that had prohibited a Sikh child from wearing a kirpan to school; the Court considered that the “minimal impairment” element of proportionality required the state to satisfy the court on the basis of evidence that a reasonable accommodation of the religious practice could not be achieved.⁹³ In *Christian Education South Africa*,⁹⁴ Sachs J (giving the judgment of the Court) stated:

“The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. *At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.*”⁹⁵

Significantly, it was this approach that led Justice Sachs, in *Minister of Home Affairs v Fourie*,⁹⁶ the South African Constitutional Court’s decision upholding a claim that the Constitution obliged the state to provide a means of recognizing same-sex unions, to require that state registrars who objected on religious grounds should be permitted not to be involved in granting such recognition. Justice Sachs, giving the judgment of the Court, stated: “The principle of reasonable accommodation could⁹⁷ be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience.”

In *Ladele*-type situations, such an approach seems particularly apposite, where the tension is between the right to non-discrimination on grounds of religion and the right to non-discrimination on grounds of sexual orientation, and there is no principled basis for deciding which should have priority. There was no indication in the national Court’s

⁹³ *Multani v. Marguerite-Bourgeoys* 264 D.L.R. (4th) 577, 2006 SCC 6, at paras [51] to [53].

⁹⁴ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC)

⁹⁵ At [35].

⁹⁶ *Minister of Home Affairs v Fourie*, (2005)

⁹⁷ In the context of the case, ‘could’ meant, in practice, ‘should’. The South African legislature took the strong hint offered by the South African Constitutional Court, and introduced a provision accommodating the conscientious objections of registrars in the same-sex marriage legislation that was introduced to implement the Constitutional Court’s decision. At [159]. See further Henriët de Ru, *The Recognition of Same-Sex Unions in South Africa* (MA Thesis, November 2009).

decision, nor in the ECtHR, why one is less worthy of the strongest protection than the other. Indeed, the local authority's own policy, *Dignity for All*, under which the domestic court considered that the local authority was acting, protected employees from both religious discrimination and discrimination on grounds of sexual orientation, without ranking them in importance.

The appropriate solution would have been for the national authorities to consider whether Ms Ladele's conscientious objection could be reasonably accommodated, along the lines suggested by Justice Sachs. It might be argued that asking the Court to require the local authority to reasonably accommodate Ms Ladele involves it examining whether a domestic authority's refusal to grant an exemption or exception from a general policy for religious reasons is compatible with the Convention, and that this is a matter that falls within the margin of appreciation. But this way of framing the reasonable accommodation claim is seriously misleading. To view the failure to accommodate as the creation of an exemption distorts a long jurisprudence on discrimination in which reasonable accommodation is seen, rather, as a way of avoiding unlawful discrimination, rather than as creating an "exception or exemption". Viewing reasonable accommodation as creating privileges for one group appears to demonstrate a misunderstanding of this long anti-discrimination jurisprudence,⁹⁸ or a desire to see the religious discrimination claim as really a freedom of religion claim (where the language of special exemption is prevalent).

Applying an anti-discrimination approach, properly understood, the Court could have sought to preserve to the maximum extent possible *both* the right to sexual orientation equality *and* the right to religious equality, where they are or may be in conflict. And had this approach been adopted, the *Ladele* case itself might have seemed a relatively easy one, because in that case, there was in fact no conflict between the rights of Ms Ladele and those of actual same sex couples seeking civil partnerships. As we have seen, her conscientious objection could have been accommodated without any adverse effects on actual same sex couples. Ms Ladele was disciplined not to protect any actual same sex couple (whose rights were not, therefore, impeded in practice) but to use the disciplining of a public servant to "send a message" to the wider community. In such a situation, the court ought to have held that there could be no proportionate justification for refusing to accommodate her conscientious objection. And the subsequent debate in Parliament might even have been more of a true dialogue, and less a dialogue of the deaf.

⁹⁸ We did not say after *Brown v Board of Education*, 347 U.S. 483 (1954) that the United States Supreme Court had created a special exemption for African American children from the legal requirement to maintain segregated schools. We did not say after *Defrenne v Sabena*, Case 43/75, [1976] ECR 455, that the European Court of Justice (as it then was) created a special exemption for female flight attendants faced with gender discrimination. Nor, in the *Ladele* case, should we regard a requirement to act in such a way as to avoid discriminating against her on religious grounds as creating a special exception.